United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7425

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AEROTRADE INC., & AEROTRADE INTERNATIONAL, INC.,

Plaintiff,

against

REPUBLIC OF HAITI,

Defendant-Appellee,

against

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Appellant.

On Appeal from The United States District Court For The Southern District of New York

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

Preliminary Statement

This brief is submitted by appellant Hartford Accident and Indemnity Company, (hereinafter referred to as Hartford) in reply to the brief of appellee Republic of Haiti (hereinafter referred to as Haiti) and in further

support of its appeal from an order of Judge Edward Weinfeld, of the United States District Court for the Southern District of New York, reported at 416 F. Supp. 1114 (S.D.N.Y. 1976), and the judgment entered thereon dated August 27, 1976.

POINT I

Haiti may not recover the overdraft charges.

The basic legal principle set forth in Hartford's brief, that in order to recover from Hartford on the attachment bond, Haiti must show that it suffered damages as a direct, proximate and natural result of the attachment, is not refuted or denied in Haiti's brief. Indeed, it is agreed that this principle is applicable. Instead, Haiti has set forth a series of factual and subsidiary legal arguments that are not supported by the record, by precedent, or persuasive legal reasoning.

First, Haiti's brief discloses its misconception of the terms and effect of Hartford's undertaking. It is contended that Hartford is proposing a "heads I win, tails you lose" approach, and to thereby obtain a "windfall". However Hartford's undertaking was not a gamble of any kind, but an agreement to pay certain amounts upon certain conditions.

Hartford's undertaking was to "pay to the defendant, Republic of Haiti, all legal costs and damages which may be sustained by reason of the attachment." Hartford was not simply betting the sum of $35,000 that Aerotrade would prevail in the action. It was undertaking to pay *damages* which Haiti might suffer by reason of the attachment. Thus Magistrate Schreiber's finding that Haiti's reimbursement of Banque, 14 months after the attachment was vacated, and 6 months after the motion

to collect on the bond, was not damage to Haiti, inevitably led to the conclusion that the amount reimbursed was not recoverable. Hartford has simply demanded that Haiti prove its damages, within the terms of the bond, and Haiti has simply failed to prove those damages (in excess of its conceded attorneys fees).

Second, Haiti's argument regarding its obligation to reimburse Banque Nationale de la Republique d'Haiti (hereinafter referred to as "Banque") is made without any support in the record. Haiti argues in its statement of facts:

> "The testimony showed that the understanding between Banque Nationale and the Republic of Haiti throughout the litigation was that the Republic would reimburse Banque Nationale for the latter's out-of-pocket expenses (App 164a)" (Haiti's brief, p. 8)

An examination of that page of the appendix and indeed of the entire record reveals no such understanding existed "throughout the litigation." The testimony of Haiti's witness on that page, to the extent it is intelligible, is at *best* ambiguous on this question. However Magistrate Schreiber, presiding at the hearing, and in fact, conducting the questioning on page 164, found no such understanding, and as this finding is not clearly erroneous, it should be reinstated on this appeal.

Haiti also asserts, without any support "Banque Nationale paid out funds . . . Quite properly, Banque Nationale charged its out-of-pocket expenses back to its depositor, the Republic . . ." (Haiti's brief, pp. 15-16). Haiti absolutely failed to demonstrate that Banque "quite properly" charged Haiti's account. The record was conspicuously devoid of any proof of an enforceable legal basis for such a charge, under American or Haitian law.

Also in connection with the issue of reimbursement, Haiti charges "When it became clear in the course of the evidence presented before the Magistrate that Haiti had actually borne the expenses, [Hartford's] argument shifted." In fact, it was Haiti's evidence which shifted. In its initial motion papers, Haiti argued that the interest charges were recoverable by Haiti, although suffered by Banque (45a-49a). Hartford (54a) and Aerotrade (record #28, pp. 2-7) immediately opposed the award of damages on the basis *inter alia* that Haiti could not recover for damages sustained by another. Haiti was unable to find any legal support for its own position, [which was subsequently rejected by Magistrate Schreiber as "wholly untenable" (261a)]. A few months thereafter, while the question of damages was still before the Magistrate, Haiti arranged "to suffer the loss itself" (165a, line 16). Magistrate Schreiber, in view of these circumstances, properly refused to find that the reimbursement to Banque was damage suffered by Haiti as a proximate result of the attachment.

Finally, Haiti attempts in its brief to get around the "clearly erroneous" standard of review required to be applied to the Magistrate's findings, by converting the crucial finding from one of fact into one of law. Haiti argues "Judge Weinfeld accepted the Magistrate's determination of facts, but rejected each of these proposed conclusions of law. He held: 'The record establishes . . .'" (Haiti's brief, p. 9). Haiti's argument is undermined by Judge Weinfeld's own diction: the reference to the record clearly indicates a finding of fact, which insofar as it reversed the Magistrate's finding, was incorrect, and did not account for the "clearly erroneous" standard. It is respectfully submitted that this Court, upon reexamination of the record, should reinstate the Magistrate's findings, and reverse the Court below.

In summary, Haiti's brief sets forth a number of factual and legal assertions which are unsupported by logic, precedent or the record. Haiti simply failed to adduce any proof that it was obligated to reimburse Banque, and it therefore suffered no compensable damages under the bond. Judge Weinfeld's decision was not supported by the record, and he failed to observe the "clearly erroneous" standard of review of findings of fact. Therefore, Haiti should be denied recovery of the overdraft charges.

POINT II

Haiti was required to mitigate its damages.

In its brief, Haiti denies that securing a bond to discharge the attachment was a reasonable or available step. Hartford proved that such bonds were generally available at the time. Whether Frank Cardi, the witness, an employee of the Insurance Department of the State of New York ever heard of the issuance of such a bond to a foreign sovereign is irrelevant.

W. B. Moses & Sons v. *Lockwood*, 295 Fed. 936 (D.C. Cir. 1924), which stands for the proposition that the victim of a wrongful attachment must mitigate his damages by obtaining a bond releasing the attachment, was not distinguished or even cited in Haiti's brief. Furthermore the case cited by Haiti, *Lawlor* v. *Magnolia Metal Co.*, 2 App. Div. 552, 38 N.Y.S. 36 (1st Dept. 1896) is distinguishable because mitigation of damages was not at issue therein. Contrary to Haiti's assertion, Weinstein, Korn & Miller, 7A *New York Civil Practice* §6222.03 (1975 rev.) cites *Lawlor* only for the proposition that the defendant is the proper party to move to discharge an attachment by bonding back. This is no help to Haiti on this appeal. *New York Civil Practice* at 6222.02 also states that there

is no inconsistency between discharging an attachment by bond and simultaneously moving to vacate the attachment. See also *Lawlor, supra*, "The giving of an undertaking to discharge the attachment does not preclude the defendant from moving to vacate the attachment." 2 App. Div. at 555, 38 N.Y.S. at 38. Thus Haiti's contentions that bonding back was not appropriate are without substance.

Therefore, in the event this Court determines that Haiti may recover the overdraft charges, the amount recoverable is limited to $4,637.50, the premium of a release of attachment bond.

CONCLUSION

For all of the foregoing reasons, and those stated in the appellant's brief herein, the determination in the Court below that Haiti may recover the interest charges should be reversed, and the recovery should be limited to attorneys fees in the sum of $13,553.02.

Respectfully submitted,

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JEROME MURRAY
JASON WALLACH
Of Counsel

376—Affidavit of Service by Mail

In The
United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Aerotrade Inc., & Aerotrade International Inc.,
Plaintiff
against
Republic of Haiti
Defendant-Appellee
against
Hartford Accident and Indemnity Company
Appellant

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Hendler & Murray, being duly sworn deposes and says that he is the attorney for the above named Appellant herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 3rd. day of January, 1977 he served the within

Reply Brief

upon the attorneys for the parties and at the addresses as specified below

Andreas F. Lowenfeld
40 Washington Square South
New York

by depositing 3 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 3rd.
day of January, 1977

Raymond J. Braddick

Roland W. Johnson,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977